Supreme Court, U.S.
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NO.

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1993

RICHARD ROCKWOOD,

Petitioner,

v.

BRIAN O'CONNELL and SHARON HILL,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE CALIFORNIA COURT OF APPEAL SECOND APPELLATE DISTRICT DIVISION SIX

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48 pp

QUESTION PRESENTED

1. May a state court ignore all federal precedent and hold that a public employee is barred from presenting evidence of a five-year hostile work environment leading to his constructive termination in a 42 U.S.C. Section 1983 ("Sec.1983") case, involving violations of free speech under the First Amendment, because of the statute of limitations, which, for Section 1983 cases, is one year in California?

LIST OF PARTIES

Richard Rockwood, Petitioner and Plaintiff-Appellant below. Sharon Hill and Brian O'Connell, Respondent and Defendants-Respondents below.[1]

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[1] The following parties were either dismissed at the trial level by Plaintiff or by summary judgment, or at the appellate level by the Court of Appeal in Mr. Rockwood's first appeal from a judgment sustaining a demurrer to his Second Amended Complaint with no leave to amend.

They are as follows: County of Santa Barbara, David Yeager, Robert Kallman, William Wallace, Dewayne Holmdahl, Toru Miyoshi, Leland Steward, William G. Menchen, Harold Purdy, Edward J. Marini, Charles F. Wagner, Ronald M. Gilman, Steven Schinnerer, Kenneth L. Nelson, David Elbaum, Frank Hawthorne, Walt Rosebrock, and Carl Hehnke. Only Mrs. Hill and Mr. O'Connell remained in the lawsuit when Mr. Rockwood went to trial in July and August 1992, and they were the defendants named in the second appeal to which judgment Mr. Rockwood seeks certiorari.

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Petitioner, RICHARD ROCKWOOD, petitions for a Writ of Certiorari to the California Court of Appeal, Second Appellate District, Division Six to review

the order filed April 7, 1994, in Rockwood v. O'Connell, et al., No. 2d Civ. B070981. Appendix ("App.") 001-020.

OPINIONS BELOW

Santa Barbara County Superior Court Judge Bruce Dodds granted Defendants Brian O'Connell and Sharon Hill's joint Motion for Nonsuit (and possibly, for Directed Verdict) at trial on August 11, 1992. Judge Dodds' rulings on the motions are reproduced in the attached Appendix at 24-28.

The judgment based on the nonsuit was filed on August 26, 1992, and is found in the Appendix at 29-30.

The opinion by the Court of Appeal affirming the judgment based on the nonsuit was filed on April 7, 1994, and is found in the Appendix at 001-020. It is this opinion to which Mr. Rockwood seeks

the Writ of Certiorari.

The order by the Court of Appeal denying Mr. Rockwood's Petition for Rehearing was filed on May 2, 1994, and is found in the Appendix at 23.

The order by the Supreme Court of California denying Mr. Rockwood's Petition for Review was filed on June 22, 1994, and is found in the Appendix at 22. The Supreme Court is the court of last resort in California, and the review sought was discretionary. This Petition is timely, having been filed within ninety days of the denial of review. Rules 13.1, 29, U.S. Supreme Court Rules.

The opinion by the Court of Appeal reversing the judgment based on the sustaining of the demurrer was filed on July 27, 1990, and is found in the Appendix at 31-48.

The amended nunc pro tunc order denying Defendants O'Connell and Hill's Motion for Summary Judgment was filed on November 18, 1991, and is found in the Appendix at 50-51.

The order denying Defendants O'Connell and Hill's Petition for Writ of Mandate by the Court of Appeal was filed on November 21, 1991, and is found in the Appendix at 52.

The order denying Defendants O'Connell and Hill's second Motion for Summary Judgment was filed on June 22, 1992, and is found in the Appendix at 53-54.

Mr. Rockwood's Second Amended Complaint was filed on June 22, 1992, and is found in the Appendix at 55 - 79.

JURISDICTION

This Court's jurisdiction is invoked

pursuant to 28 U.S.C. Sec._____.

The judgment of the California Court of Appeal sought to be reviewed was entered on April 7, 1994. Denial of discretionary review of that judgment by the Supreme Court of California, California's court of last resort, was filed on June 22, 1994.

This Petition is timely, having been filed within ninety days of the denial of discretionary review. Rules 13.1, 29, U.S. Supreme Court Rules.

CONSTITUTIONAL PROVISION AND STATUTE INVOLVED

The Free Speech Clause of the First Amendment of the United States Constitution states as follows:

> "Congress shall make no law...abridging the freedom of speech,..."

Sec.1983 states as follows:

"Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress...."

STATEMENT OF THE CASE

A. <u>The Federal Question</u>. The federal question has always been present since this is a Sec.1983 case alleging

violations of the U. S. Constitution, with the one remaining claim in the action based on the Free Speech Clause of the First Amendment of the United States Constitution. See Second Amended Complaint, App. 55 - 79.

B. Introduction.

> "A single photograph of two sumo wrestlers engaged in combat may give the impression they are dancing a pas de deux. One must witness the entire match to appreciate its meaning and significance." Justice Gilbert writing for the Court in Accardi v. Superior Court (1993) 17 Cal.App.4th 341, 350.

Despite Justice Gilbert writing this imaginative metaphor in a case where he and his fellow justices ruled that the one-year statute of limitations in cases

alleging violations of California's Fair Employment and Housing Act ("FEHA") did not limit Ms. Accardi's right to present evidence of an eleven-year hostile work environment based on sexual discrimination and retaliation, Justice Stone turned the Accardi ruling on its head in the instant case, holding that the California one-year statute of limitations in Sec.1983 cases [2] limited Mr. Rockwood's attempt to present a five-year campaign of retaliation and harassment based on his exercise of free speech rights to the one year preceding the filing of the action.

Because of this severe limitation on the evidence, the remaining two defendants in the case, Sharon Hill, Assistant

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[2] This Court held in Wilson v. Garcia, 471 U.S. 261 (1985) that the statute of limitations applicable to Sec. 1983 actions is the one for personal injury of the state where the Sec. 1983 action is brought.

Director of Department of General Services, Santa Barbara County and Mr. Rockwood's immediate supervisor, and Mr. Brian O'Connell, Director of Department of General Services, Santa Barbara County and Mr. Rockwood's second-line supervisor, may appear to be dancing a "pas de deux" in a ballet when in fact they are two wrestlers pinning Mr. Rockwood to the ground.

The Court ignored the arguments of the prestigious amici, American Civil Liberties Union of Southern California, National Whistleblowers' Center, and California Employment Lawyers' Association, all urging reversal of the nonsuit.

In Accardi, supra, Justice Gilbert relied on federal precedent, primarily Meritor Savings Bank v. Vinson, 477 U.S. 57 (1986), in support of its holding that

Ms. Accardi could maintain a claim for eleven years of harassment and discrimination. Accardi, supra, 17 Cal.App.4th at 346, 347, 348, 349, 350, 352. He also relied on San Pedro Peninsula Hospital (1989) 214 Cal.App.3d 590, a sexual harassment case brought under the FEHA statute. Fisher, like Accardi, heavily relied on federal precedent. In both of these cases, Mr. Rockwood's attorney represented the plaintiff.

In Meritor, this Court examined Ms. Vinson's entire four-year work history without regard for the limitations period.

This makes good sense, since as pointed out by Justice Gilbert in Accardi, supra, 17 Cal.App.4th at 350:

"A view of the events from beginning to end enables the trier of fact to

see their relationship to one another, and consequently their meaning and significance....The department's actions concerning Accardi during the years 1989 through 1991, if viewed as solitary events, could be nondiscriminatory, and therefore legitimate. A seemingly nondiscriminatory reason for an employment decision, may be a pretext for what in fact is a discriminatory reason for the employer's decision." Emphasis added.

Even the California Supreme Court -- from whom Mr. Rockwood sought discretionary review -- ruled in a state age discrimination and common-law tort case, Turner v. Anheuser-Busch, 94 Daily Journal D.A.R. 10373, 10375, No.S.029985 (July 25, 1994), 7 Cal.4th 1238, (like the

Court of Appeal in Accardi, heavily relying on federal precedent), that

> "Although we agree... that there is an 'outer limit' beyond which an employee cannot remain on the job after intolerable conditions arise and still claim constructive discharge, reliance on the applicable limitations period to define that limit is unduly arbitrary." Emphasis added.

It took some years to convince trial courts that sexual harassment is not about sex, but rather about tyranny and abuse of power.

So, retaliation against a male employee because he engaged in free speech is not about reasonable business actions by supervisors but about tyranny and abuse of power. And as the child is the father

of the man, (as Woodsworth wrote), so, past acts are the ancestors of today's and tomorrow's decisions.

By its ruling, the Court did not permit the full picture of what O'Connell and Hill were doing to Rockwood between May 1984 and August 1986, and certainly, not the "childhood" of Hill's and O'Connell's relationship with Rockwood.

By the Court's ruling, no plaintiff alleging a Sec.1983 continuing violation claim could file one year after being constructively terminated. If Mr. Rockwood had waited until June 1988, which was one year after being constructively terminated, he could not have presented <u>any</u> evidence of the hostile work environment, only the evidence that he left his employment.

The Court's ruling effectively bars

constructive termination/hostile work environment/continuing violation cases from being brought under Sec.1983. Yet, as we have demonstrated, and will further demonstrate, federal precedent permits introduction of hostile and retaliatory acts which occur outside the statute of limitations.

It is also abundantly clear that a public employee may allege a constructive termination in Sec.1983 cases brought under the Free Speech Clause of the First Amendment.

See, for example, Clark v. Yosemite Community College Dist., 785 F.2d 781 (9th Cir. 1986); Reussow v. Eddington, 483 F.Supp. 739, 740 (D. Colo. 1980). Cf. Young v. Southwestern Savings & Loans Ass'n, 509 F.2d 140, 144 (5th Cir. 1975).

Finally, we note that by the Court's

ruling, plaintiffs' ability to present all the evidence of their hostile work environment in constructive termination cases brought under Sec.1983 will vary, depending on what state she lives in and that state's personal injury statute of limitations. Thus, this Court should grant certiorari in order to correct the error of the state court.

C. **Procedural History of Case.**

On August 10, 1987, Mr. Rockwood and his wife, Barbara Rockwood filed a complaint for damages and declaratory and injunctive relief. They sued the County of Santa Barbara, members of the Board of Supervisors, two members of the Grand Jury, various County employees and officials, including Mr. Rockwood's two former supervisors, Brian O'Connell, Director of the Department of General

Services ("DGS") and one of his two assistants, Sharon Hill.

Mr. Rockwood alleged he was a former employee of Santa Barbara County working as an Equipment Superintendent and then as a Vehicle Specialist (in DGS) from December 1980 to June 1987. He alleged he was subjected to a deliberate course of retaliatory conduct in his employment for five years, leading to his termination to punish him for speaking out against corruption and for attempting to initiate reform to eliminate the corruption in his department. He alleged violations of his First, Fifth and Fourteenth Amendments under Sec. 1983 in the First Cause of Action and violations of Article I, Sections 1, 2, 7, and 13, California Constitution in his Second Cause of Action.

In the third cause of action, Barbara Rockwood asserted a loss of consortium applicable to all the defendants.

Mr. Rockwood filed his second amended complaint on November 4, 1988. App.55 - 79. Mrs. Rockwood was no longer a Plaintiff. Mr. Rockwood sued the same individuals as in the first complaint, except the Grand Jury members and three of his former supervisors, who he dismissed from the lawsuit.

With some changes, Mr. Rockwood asserted the same facts and claims as alleged in his other two complaints, but eliminated the procedural due process and the Article I, Section 13, California Constitution claims.

Defendants filed three demurrers all of which were sustained by the Court. The Court sustained the third demurrer (to the

second amended complaint, App. 55-79), without leave to amend in a memorandum of intended decision filed on March 29, 1989.

Plaintiff filed a notice of appeal on June 5. On July 27, 1990, the Court of Appeal, Second Appellate District, Division Six, filed an opinion which partially affirmed and partially reversed the judgment of dismissal. APP.001-020.

This Court stated as follows:

> "....[T]he complaint alleges that job supervisors William Menchen, Charles Wagner, Brian O'Connell and Sharon Hill recommended that Rockwood's job category be eliminated in retaliation for the exercise of his right of free speech. That is sufficient to state a cause of action as to those

defendants." APP. 0042.

On June 13, 1991, Defendants filed a Motion for Summary Judgment ("MSJ") on behalf of Defendant Charles Wagner. Mr. Rockwood opposed the motion in writing. On August 5, 1991, the Court entered an order giving summary judgment to Mr. Wagner.

On August 1, Defendants moved for summary judgment on behalf of William Menchen. On August 20, Plaintiff filed his opposition. On September 12, the Court granted summary judgment to Mr. Menchen.

On September 24, Defendants Brian O'Connell and Sharon Hill filed two MSJ's. On October 11, Plaintiff filed his opposition to them. On November 18, 1991, the Court denied the motion in its entirety. APP. 0052.

On November 14, Defendants Hill and

O'Connell petitioned the Court of Appeal, for a writ of mandate concerning the denial of the MSJ. On November 21, the Court denied the petition. APP. 0052.

On November 8, 1991, the law firm of Staton and Tardiff entered its appearance on behalf of Sharon Hill.

On May 1, 1992, Mr. Tardiff served a second MSJ on behalf of Mr. O'Connell and Ms. Hill. On May 15, Mr. Rockwood filed his opposition. On June 22, 1992, the Court denied the motion. APP. 0053-0054.

After several continuances, the parties appeared on July 1, 1992, for trial, and the presiding judge, Judge Ronald Stevens, assigned the case to Judge Bruce Dodds. Mr. Tardiff filed 22 motions in limine on behalf of both Defendants.

On July 2, the parties appeared for argument on the motions in limine. Almost

all the motions in limine brought by Defendants were granted. On August 3, Plaintiff's one motion in limine was granted without opposition from opposing counsel.

On July 6, the parties appeared for trial at which time Plaintiff's counsel served a statement of disqualification on Judge Dodds. Judge Dodds had himself sworn in so that he could provide a sworn response to the statement.

The statement of disqualification was referred to Judge Randall, Kern County. On July 28, 1992, Judge Randall denied the statement of disqualification.

Jury trial commenced on August 3 through August 6, began again on August 10, and concluded on August 11. On August 11, the court granted Defendants' motions for nonsuit, and possibly for directed

verdict. App.26, lines4-7; App.28:21-28.[3]

On August 26, 1992, judgment was entered for Defendants. APP. 29-30. On September 23, 1992, Mr. Rockwood filed notice of intention to move for new trial.

On October 9, Defendants Hill and O'Connell filed a memorandum for costs. On October 26, Mr. Rockwood filed a motion to tax costs. On October 8, Defendants filed a motion for attorney's fees. On October 26, Mr. Rockwood filed his opposition to the motion and a timely notice of appeal from the judgment entered

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[3] Mr. Tardiff prepared the judgment and in that judgment he indicated that Plaintiff rested on August 3, which is an error. Ms. Barry wrote Mr. Tardiff suggesting that he amend the judgment nunc pro tunc to change the date from August 3 to August 11. As far as Ms. Barry knows, Mr. Tardiff did not make this correction.

on August 26.

On October 30, Mr. Rockwood filed a second statement of disqualification along with Mr. Rockwood's motion for a new trial. On October 29, 1992, Judge Dodds denied Mr. Rockwood's motion for a new trial, and Defendants' motion for attorneys' fees. He taxed costs in the amount of $4,415.13 for each Defendant. APP.1318. He also disqualified himself from all further proceedings in accordance with Code of Civil Procedure, Sec.170.1(a)(6).

On December 23, Defendants filed a timely notice of appeal from the order of October 30, 1992. On January 8, 1993, Mr. Rockwood filed timely notice of cross-appeal from the portion of the order directing that he pay costs in the amount of $8,830.26.

On April 7, 1994, the Court of Appeal issued its decision affirming the lower Court's nonsuit, denial of attorney fees, and order of Costs for Defendants. App.001-020.

D. **The Court of Appeal Decision.** The Court of Appeal ruled that the one-year statute of limitations in Sec.1983 cases prohibits introduction of acts occurring prior to the statutory period. App. 005.

It then held that the facts "...proffered at trial establish that respondent (sic) never engaged in actionable discriminatory practices. Accordingly, there could be no prior 'continuing' acts to which the evidence presented could relate." Id.

The Court discussed the standard of review applicable to nonsuits, Id. at 6-7;

elements of a Sec.1983 claim, Id. at 7-10 an analysis of the evidence of retaliation presented by Petitioner at his trial, Id. at 11-18; and a case law analysis of why the Court was affirming the denial of attorney fees to Defendants, although appearing to confuse Mr. Rockwood's appeal from the costs awarded to Defendants with Defendants' appeal from the denial of attorney fees, but ultimately apparently denying both appeals. Id. at 18-20.

REASONS FOR GRANTING REVIEW

A. **Review Is Necessary so that This Court Can Correct This State Court of Appeal's Impliedly Ruling that an Employee May not Maintain a Hostile Work Environment-Constructive Termination Claim Under Sec.1983.**

From the date he filed his court action in August 1987, Mr. Rockwood has always been consistent in his legal theories. His job was invaded by termination, abolishment, and demotion, and he was subjected to a hostile work environment by Defendants Hill and O'Connell and others (including dismissed defendants) beginning in 1982 resulting in a constructive termination on June 30, 1987.

See APP. 0060, (2d Amend. Compl.), parag.18, ("campaign of retaliation and harassment...which continued until Plaintiff was constructively terminated..."); APP. 0061, parag.25 ("As ongoing retaliation and harassment..."); APP. 0064, parag.38 ("Defendants O'CONNELL and HILL engaged in a continuing pattern of harassment and retaliation against

Plaintiff..."); APP. 0068, parag.57 ("They finally approved the elimination of Mr. Rockwood's vehicle specialist job, and Plaintiff was constructively terminated on June 30, 1987").

In denying Mr. Rockwood the right to present the entire five year campaign of retaliation and harassment, the Court of Appeal ignored these allegations and further ignored federal Sec.1983 case law holding that hostile work environment - constructive termination claims may be alleged in Sec. 1983 cases. See, for example, Clark v. Yosemite Community College Dist., 785 F.2d 781 (9th Cir. 1986); Young v. Southwestern Savings & Loans Ass'n, 509 F.2d 140, 144 (5th Cir. 1975); Reussow v. Eddington, 483 F.Supp. 739, 740 (D. Colo. 1980).

There is good reason for including

all acts of a hostile work environment without regard to the SOL. First, the acts outside the SOL provide meaning, significance, and context to the acts occurring within the SOL.

> "The Court considered those incidents that fall outside the time frame of a Title VII complaint for the purpose of determining the context of the incidents which are actionable (i.e., whether the more recent conduct may be dismissed as an aberration or must be considered to be a part of the work environment) and for the purpose of assessing the reasonableness of the response by defendants to the complaints that Robinson made during the Title VII time

frame." Robinson v. Jacksonville Shipyards, Inc., 760 F.Supp. 1486, 1494-1495 (M.D. Fla. 1991).

A reason, other than providing context, for considering the entire hostile work environment is that the plaintiff must prove the pervasiveness of the environment.

> "...The required showing of severity or seriousness of the harassing conduct varies inversely with the pervasiveness or frequency of the conduct. See King v. Board of Regents of University of Wisconsin System, 898 F.2d 533, 537 (7th Cir. 1990) ('[a]lthough a single act can be enough, ... generally, repeated incidents create a

stronger claim of hostile environment, with the strength of the claim depending on the number of incidents and the intensity of each incident.')" Ellison v. Brady, 924 F.2d 872, 878 (9th Cir. 1991).

As Amicus National Whistleblowers' Center pointed out at p.3 of its brief, federal civil rights cases permit the plaintiff to present evidence of discriminatory actions which predate the filing date of the complaint as relevant background evidence to prove present patterns of behavior. Malhotra v. Cotter & Co., 885 F.2d 1305 (7th Cir. 1989).

Further, as the Center also pointed out, Id., Courts generally recognize an equitable exception to the statutory limitations period for continuing

violations if the employment practices went on over a period of time, rather than as a series of discrete acts. Waltman v. International Paper Co., 875 F.2d 468 (5th Cir. 1989); Bruno v. Western Electric Co., 829 F.2d 957 (10th Cir. 1987).

In Valdez v. City of Los Angeles (1991) 231 Cal. App.3d 1056, 228 Cal. Rptr. 726, 733, Division Seven of the Second Appellate District emphasizes that an employee must prove "aggravating factors", such as "a continuous pattern of discriminatory treatment over a period of years".

The Court noted that

> "Some employees [like Mr. Rockwood] may stay on the job and endure very difficult circumstances that might have caused others similarly situated

to quit sooner." Id., emphasis added.

The court also used other cases as illustrations of hostile work environments which were beyond the SOL, including the one Ms. Barry won in Washington, D. C. against the U. S. Army:

> "In Clark v. Marsh, supra, 665 F.2d at page 1170, the plaintiff endured a pattern of discriminatory treatment for over five years before resigning." Valdez, supra, 282 Cal. Rptr. at 735.

The Valdez Court, Id., also noted that:

> "California courts too have upheld claims of constructive discharge where the intolerable conditions complained of began more than a year

before the plaintiff resigned." (See, Brady v. Elixir Industries, supra, 196 Cal.App.3d at p. 1302, 242 Cal.Rptr. 324; Zilmer v. Carnation Co. (1989) 215 Cal.App.3d 29, 34, 38-39, 263 Cal.Rptr. 422; Fidler v. Hollywood Park Operating Co. (1990) 223 Cal.App.3d 483, 486, 272 Cal.Rptr. 895)."

The Valdez Court specifically rejected the holding in Panopulos v. Westinghouse Electric Corp. (1989) 216 Cal.App.3d 660, 670 which held that the plaintiff was limited to the SOL period of one year to prove his hostile work environment, stating

> "We find no basis in precedent or logic for holding an employee who remains on the job beyond some arbitrarily set time limit

is barred as a matter of law from claiming work conditions were intolerable." Valdez, supra, at 734.

Since Mr. Rockwood alleges a federal cause of action, it is worth noting that the Valdez Court also stated that the Panopulos Court itself acknowledged that a judicially created time limit

"...conflicts with federal cases which treat the length of time an employee remains on the job under allegedly intolerable circumstances as one circumstance within the 'totality of circumstances' to be considered by the trier of fact. [Citation omitted.]" Id., emphasis added.

See also p.11 of this Petition for

the California Supreme Court's ruling on this issue in Turner, supra.

As established above, federal courts routinely rely on employment discrimination cases when considering Sec.1983 cases and vice versa, and California courts rely on both when ruling in civil rights cases.

For example, In Erickson v. Pierce County, 960 F.2d 801 (9th Cir. 1992), a Sec. 1983 First Amendment case on which Mr. Tardiff and Judge Dodds relied for the granting of nonsuit, App.26:25-28 the Ninth Circuit relied on a Title VII employment discrimination case, U.S. Postal Serv. Bd. of Governors v. Aikens, 460 U.S. 711, 716-17 (1983) to hold that

> "It is well established that a plaintiff need not prove allegations with direct evidence

and that circumstantial evidence can be sufficient."

(A rule of law that ought not to go unheeded in this case).

In fact, all federal cases addressing the issue hold that evidence of intolerable conditions outside the limitations period may be introduced to prove constructive termination claims.

See, for example, Real v. Continental Group, Inc., 627 F.Supp. 434, 443-444 (N.D. Cal. 1986) (14 months); Clark v. Marsh, 665 F.2d 1163, 1170 (D.C. Cir. 1981) (five years); Rutan v. Republican Party of Illinois, 868 F.2d 943, 956 (7th Cir. 1989) (multiple plaintiffs over five years); Goss v. Exxon Office Sys. Co., 747 F.2d 885, 888-889 (3rd Cir. 1984) (nineteen months).

Yet, the Court of Appeal provided no

rationale for taking Mr. Rockwood's case out of this general federal rule permitting evidence of acts comprising the hostile environment outside the limitations period. See, e.g., Meritor Savings Bank, supra; Robinson v. Jacksonville Shipyards, Inc., supra; Bazemore v. Friday, 478 U.S. 385, 402 n.13.

Evidence of Mr. Rockwood's efforts to stop, and complaints about, Mr. Hawthorne's corruption and the five year campaign of harassment and retaliation against Mr. Rockwood for doing so was relevant to proving how repugnant the assignment to work under the direct supervision of Mr. Hawthorne was to him.

Exclusion of such evidence prohibited Mr. Rockwood from proving all the evidence he had to show that a reasonable person in

his position would have resigned. BAJI Instruction 10.42.1; Foley v. Interactive Data Corp. (1988) 47 Cal.3d 654, 669, 254 Cal. Rptr. 211, 217-218; Brady v. Elixer Industries (1987) 190 Cal.App.3d 1299, 1306, 242 Cal.Rptr. 324, 328; Satterwhite v. Smith, 744 F.2d 1380 (9th Cir. 1984); Noland v. Cleland, 686 F.2d 896 (9th Cir. 1982).

Furthermore, Mr. Rockwood was not allowed to prove the second element of a constructive termination case, and that is

> "...the employer had actual or constructive knowledge of the allegedly intolerable conditions, their impact on the employee, and could have remedied the situation. (Brady v. Elixir Industries, supra, 196 Cal.App.3d at p. 1306, 242 Cal.Rprt. 324.)" Valdez, Supra, 228

Cal.Rptr. at 735.

B. Conclusion.

We have demonstrated that by affirming the trial court's order denying presentation of evidence of acts of retaliation and harassment outside the statute of limitations of one year, the Court of Appeal ignored all federal precedent. We ask the Court to correct this grave error and grant Mr. Rockwood's Petition for Writ of Certiorari.

PATRICIA J. BARRY

Dated at Lomita, California
this 20th day of September 1994.